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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

2012 MAR 28 P 4: 44

GARY PIERCE

Chairman

BOB STUMP

Commissioner

SANDRA D. KENNEDY

Commissioner

PAUL NEWMAN

Commissioner

BRENDA BURNS

Commissioner

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

MAR 28 2012

DOCKETED BY

IN THE MATTER OF:

GEORGE BIEN-WILLNER, for GLENDALE &
27TH INVESTMENTS, LLC,

COMPLAINANT,

v.

QWEST CORPORATION,

RESPONDENT.

DOCKET NO. T-01051B-10-0200

QWEST CORPORATION'S
MOTION TO DISMISS

MOTION TO DISMISS

Pursuant to Arizona Administrative Code ("A.A.C.") R14-3-101 and Rule 12(b) of the Arizona Rules of Civil Procedure, Qwest Corporation ("Qwest") moves to dismiss the above-captioned Second Amended Complaint on the grounds that (i) the Complainant has failed to state a claim upon which relief can be granted, and (ii) the Arizona Corporation Commission ("Commission") lacks subject matter jurisdiction to grant the requests for relief set forth in part IV under the heading "PRAYER FOR RELIEF." In support of this motion, Qwest states the following:

1 1. The Complainant has persistently presented confusing, inconsistent, and vague
2 iterations of his positions. The Hearing Division has extended multiple opportunities for the
3 Complainant to articulate sufficient facts and a legal basis for asserting a claim upon which the
4 Commission may determine whether relief is warranted. In this, the third try, the Complainant
5 has failed again. The Complainant's pleadings vacillate between asserting "[t]his is a
6 straightforward case of Qwest overcharging the Complainant thousands of dollars for an 800
7 telephone line he never ordered or requested, and from which he derived no benefit,"¹ and a
8 confusing jumble of highly generalized and factually unsupported assertions, peevs, and cites to
9 Arizona statutes and Commission rules.

10 2. The Complainant repeats the allegation that Qwest refused to participate in an
11 informal complaint process before the Commission,² a process that the Complainant has invoked
12 approximately 15 times previously according to the Commission Staff.³ The Administrative
13 Law Judge has considered the issue previously, and concluded that the informal process for this
14 matter had been completed. (Procedural Order, February 17, 2011). The Complainant brings his
15 peeve forward yet again, but does not specifically connect it to any of his Claims stated in part
16 III of the Second Amended Complaint or requests for relief in Part IV. The Commission should
17 dismiss his allegations.

18 3. The Complaint alleges a number of facts and factual conclusions that are vague,
19 conclusory, or indistinct, and amount to innuendo.

21 ¹ Amended Complaint, para. 3. In the Second Amended Complaint, the allegedly
22 unauthorized service is not even named in his otherwise very similar para. 3. In the Second
23 Amended Complaint, the kind of service that was allegedly unauthorized has become an either /
24 or proposition. He refers to "any type or manner of toll trunk or 800 number service." Para. 20.
25 Sometimes the Complainant just let it go as "telephone services." Para. 19. The specificity the
Commission had hoped for when the Complainant was allowed a third opportunity to write a
cogent complaint has only been met with increased vagueness.

² Second Amended Complaint, para. 5.

³ Staff Motion to Forego Staff Participation in Informal Mediation, filed December 7, 2010.

- 1 (i) The Second Amended Complaint dwells on veiled insinuations of improper
2 conduct regarding Qwest's business practices relating to keeping paperwork;⁴
3 (ii) The Second Amended Complaint asserts "[n]umerous difficulties" relating to
4 billing,⁵ without identifying the telephone numbers, accounts, services, customer
5 locations, and without describing the "difficulties."

6 It is unclear why Complainant recites such allegations, because no damages are stated and they
7 are not connected to any claim for relief. Further, these allegations are stated separately from
8 what seems to be the central allegations made in paragraphs 18-22. Qwest does not ask that the
9 matters stated in paragraphs 18-22 be dismissed.

10 4. The Second Amended Complaint repeats unsupported vague assertions about
11 how Qwest allegedly "failed to provide truthful and clear billing,"⁶ and then launches another
12 spate of unsupported allegations claiming that Qwest "engaged in . . . deceptive practices" and
13 "has withheld information."⁷ Justiciable claims cannot be made by mere recitation of conclusory
14 expressions, standing alone, without any allegations of specific acts. The matters stated in
15 paragraph 38 should be dismissed.

16 5. The scope of the Amended Complaint must be limited insofar as it attempts to
17 obtain relief on behalf of "other Arizona citizens" who are not named, and with respect to whom
18 no salient facts are alleged.⁸ Complainant lacks standing to file this Complaint on behalf of
19 those other complainants. Further, the Complaint does not support a finding from which the
20 Commission could grant such relief or that other customers have experienced the problems this
21 Complainant alleges.

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23 ⁴ Second Amended Complaint, paras. 7, 8, 28, 29, 30, 31, 32, 33, 34.

24 ⁵ *Id.*, paras. 12, 13, 14, 15, 16, 17, 27.

25 ⁶ *Id.*, para. 38.

⁷ *Id.*

⁸ *Id.*, para. 35.

1 6. The exhortation for the Commission “to look into and remediate the wrongful
2 actions and practices alleged”⁹ are not supported by the reference in paragraph 38 to completely
3 unrelated actions taken by the Commission with respect to individuals not parties to this
4 proceeding, against an electric utility unaffiliated with Qwest, for a problem that was completely
5 dissimilar from that which is alleged here.¹⁰ The matters addressed in paragraph 38 should be
6 dismissed.

7 7. In paragraph 39, the Complainant resumes his already-failed accusations that
8 Qwest has wrongfully withheld documents and information.¹¹ No instances of wrongful
9 withholding, old or new, are described. The allegation in paragraph 39 should be dismissed.

10 8. The Second Amended Complaint Prayer for Relief, Part IV, page 13, requests
11 monetary damages. Again, the Second Amended Complaint is vague. In this instance it fails to
12 specify whether the Complainant seeks a refund of rates that might be ordered if the Commission
13 finds that Qwest overcharged its tariffed rates, which would be within the Commission’s power
14 to award if he proves his allegations in paragraphs 18-22, or whether the Complainant seeks, as
15 he has done previously, compensation for his time in bringing this actions, or seeks some other,
16 undefined measure of monetary damages. The Commission lacks authority to award monetary
17 damages, including exemplary damages which Complainant also requests. The power to award
18 money damages is plainly a judicial power vested in the Courts. Eastin v. Broomfield, 116 Ariz.
19 576, 582, 570 P.2d 744, 750 (1977) (“Judicial power is the power of the court to decide and
20 pronounce a judgment and carry it into effect between persons and parties who bring a case
21 before it for decision (citations omitted).”); see also, Ariz. Const. Art. 6, §§ 1 and 14. The
22 Arizona Constitution does not authorize the Commission to render a judgment for money

23 ⁹ Id., para. 38.

24 ¹⁰ Id., para. 37.

25 ¹¹ Procedural Order, February 10, 2012, confirming that the Complainant’s Motion to Compel is denied.

1 damages, and, accordingly, the Commission may not so do. Trico Electric Cooperative. v.
2 Ralston, 67 Ariz. 358, 363, 196 P.2d 470 (1948) ("No judicial power is vested in or can be
3 exercised by the corporation commission unless that power is expressly granted by the
4 constitution."). The Complaint's reliance on A.R.S. §§ 40-421 and 40-423¹² in this regard is
5 misplaced. Those statutes clearly contemplate that the Commission shall bring enforcement
6 actions to court, and it is the court that has the power to award damages or issue injunctions.

7 9. The Commission's powers are limited and do not exceed those to be derived from
8 a strict construction of the Arizona Constitution and implementing statutes. Tonto Creek Estates
9 Homeowners Ass'n v. Arizona Corp. Comm'n, 177 Ariz. 49, 864 P. 23 1081 (App. 1993.). The
10 Commission does not have the authority to require payment of damages by Qwest Corporation,
11 as requested.

12 10. The request for injunctive relief is odd, since the Complainant no longer buys
13 services from Qwest Corporation, and all the matters alleged occurred years in the past. The
14 request for injunctive relief should therefore be denied, because there is no current, pending, or
15 threatened activity, and for the reasons described above regarding the Commission's authority.

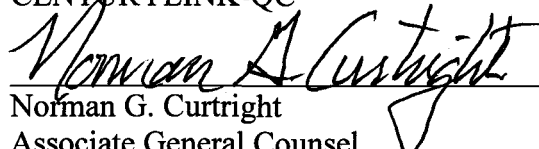
16 11. The deficiencies that exist on the face of the Second Amended Complaint and the
17 Commission's authority to grant the Complaint's Requests for monetary, exemplary, injunctive,
18 and other unspecified relief are threshold issues that should be decided before Qwest is required
19 to Answer and the Commission further expend resources.

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25 ¹² Second Amended Complaint, para. 38.

1 WHEREFORE, Qwest moves to dismiss the Second Amended Complaint in whole or
2 part as requested above.

3 RESPECTFULLY SUBMITTED, this 28th day of March, 2012.

4 QWEST CORPORATION d/b/a
5 CENTURYLINK-QC

6 
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12 ORIGINAL and thirteen (13) copies filed
13 this 28th day of March, 2012, with:

14 Docket Control
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18 Copy of the foregoing sent via e-mail and
19 U.S. Mail this 28th day of March, 2012, to:

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